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AIDS Infects the Canadian Legal Community: Canada's Inconsistent Application of Common Law Criminalizng Carriers

Pamela Reeder

AIDS INFECTS THE CANADIAN LEGAL COMMUNITY: CANADA'S INCONSISTENT APPLICATION OF COMMON LAW CRIMINALIZING CARRIERS

I. INTRODUCTION

According to the World Health Organization (WHO), Human Immunodeficiency Virus (HIV)[1] has infected up to seventeen million people, three-quarters of them in the developing world.[2] The WHO estimates that HIV will infect forty million people by the end of the decade.[3] In light of this serious epidemic, it is understandable why many citizens look to their government for protection.[4] Canada, the United States, England, and Australia are examples of countries that have debated whether criminalizing the transfer of the virus will hinder its spread.[5]

As a result of countries' reactions to the virus and the disease, the battle against Acquired Immune Deficiency Syndrome (AIDS) has spread from hospitals and laboratories into the courtrooms of the world. Recently, courts have experienced an influx of cases where a person afflicted with HIV has intentionally, or recklessly, exposed others to the virus.[6]

Different countries' legal systems deal with the transmission of HIV in different ways.[7] Although most countries have experienced cases involving the intentional spread of HIV, controversy

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1. HIV is the virus that causes Acquired Immune Deficiency Syndrome (AIDS). AIDS PROJECT LOS ANGELES, AIDS: A SELF-CARE MANUAL (2d ed. 1993).

2. *Full-Blown AIDS Cases Estimated at 4 million*, N.Y. TIMES, July 2, 1994, at 8.

3. Juliet O'Neil, *Improved Co-ordination Needed in Global Fight Against AIDS, PM Says*, OTTAWA CITIZEN, Dec. 2, 1994, at 8.

4. *Be Tough on Those Who Spread AIDS*, MONTREAL GAZETTE, Aug. 19, 1993, at B2 [hereinafter *Tough on AIDS*]; Tom Blackwell, *Law Outlawing Deliberate Spread of AIDS Virus is Studied*, MONTREAL GAZETTE, May 19, 1993, at B1; *Spreading of AIDS Criminal, Doctor Says*, VANCOUVER SUN, June 9, 1994, at B16 [hereinafter *Spreading AIDS Criminal*]; David Storey, *Britain Ponders How to Stop Wilful AIDS Infection*, Reuter Library Report, June 23, 1992, *available in* LEXIS, News Library, NON-US File; Debbie Salamone, *Exposing Someone to AIDS—Is that a Crime?*, ORLANDO SENTINEL TRIB., May 12, 1992, at A1; Peter Mosley, *Worldwide Dilemma Should AIDS be a Crime?*, Reuter Library Report, June 29, 1992, *available in* LEXIS, News Library, NON-US File.

5. Salamone, *supra* note 4, at A1; Mosley, *supra* note 4.

6. Robert Bragg, *AIDS is Out There Just Waiting*, CALGARY HERALD, Nov. 24, 1993, at A4; *HIV and the Code*, WINDSOR STAR, May 31, 1993, at A6; Salamone, *supra* note 4, at A1.

7. Mosley, *supra* note 4.

remains about whether these cases are common enough to criminalize the behavior, thereby stigmatizing the HIV carrier even further.[8]

After a few high-profile cases in which a defendant intentionally threatened, or actually infected, others with HIV, Canadians began criticizing their legal system for not protecting the public from AIDS.[9] The Canadian Parliament, however, has not enacted legislation to outlaw the transfer of HIV.[10] On the other hand, some Canadian courts have taken a strict stand against those who threaten others with HIV.[11]

U.S. citizens have similarly demanded protection from their government.[12] U.S. state and federal courts, however, are not as willing as Canadian courts to criminalize the intentional spread of the virus without any truly applicable precedent.[13] The courts' silence on the issue forced state legislatures to draft laws that criminalize the intentional or reckless transfer of the virus.[14]

Some Canadian commentators argue that the Parliament should draft legislation comparable to statutes found in many U.S. states.[15] Because Canadian statutory law does not address the transfer of HIV, and the threat of the virus is so recent that common law precedent is minimal,[16] Canadian law is very unstable when addressing this issue. In fact, the area is so legally tenuous that Canadian judges continuously disregard the few recent cases that do address the criminalization of the transfer of HIV,

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8. Storey, *supra* note 4; Salamone, *supra* note 4, at A1.

9. Blackwell, *supra* note 4, at B1; *Tough on AIDS*, *supra* note 4, at B2.

10. *Top Court Upholds AIDS Ruling*, CALGARY HERALD, Mar. 4, 1994, at A14 [hereinafter *Top Court*].

11. Regina v. Thornton, 82 C.C.C.3d 530, 530 (1993) (Can.); Regina v. Mercer, 84 C.C.C.3d 41, 65 (Nfld. Ct. App. 1993); Regina v. Ssenyonga, 73 C.C.C.3d 216, 221 (Ont. Prov. Div. 1992).

12. Salamone, *supra* note 4, at A1; Curtis Krueger, *Look at What Lawmakers are Doing for Us*, ST. PETERSBURG TIMES, Feb. 6, 1994, at 60; T.J. Milling, *Texas AIDS Law Off Books in 1994*, HOUS. CHRON., Sept. 5, 1993, at C1.

13. Krueger, *supra* note 12, at 60; Milling, *supra* note 12, at C1.

14. Krueger, *supra* note 12, at 60; Milling, *supra* note 12, at C1; *see, e.g.*, ARK. CODE ANN. § 5-14-123 (Michie 1994); CAL. HEALTH & SAFETY CODE § 1621.5 (West 1995); FLA. STAT. ANN. § 775.0877 (West 1995).

15. *HIV and the Code*, *supra* note 6, at A6; Blackwell, *supra* note 4, at B1.

16. *Top Court*, *supra* note 10, at A14; *see also* Regina v. Ssenyonga, 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993); Regina v. Thornton, 82 C.C.C.3d 530, 533 (1993) (Can.); Regina v. Mercer, 84 C.C.C.3d 41, 49 (Nfld. Ct. App. 1993).

and instead develop their own legal analysis.[17]

The Canadian Parliament may have the same fears that originally hindered the U.S. legal community from expanding the common law to include transmission of HIV as a crime. In the mid-eighties, most U.S. county district attorneys and state courts were wary of criminalizing the spread of HIV because of the possible infringement on the personal liberties of HIV-infected citizens.[18] For the same reason, state legislatures were slow to pass laws that dealt directly with the intentional or reckless transmission of the virus. Although many vocal constituents feared that the stigma of HIV would increase if intentional transmission was criminalized, a greater constituency of U.S. citizens demanded such legislation from their state governments.[19]

Without legislation, U.S. state courts were hesitant to use common law, as Canada does, to convict a defendant for transmitting HIV.[20] Utilizing common law to criminalize the transfer of HIV has resulted in inconsistent prosecution of similar conduct in Canada.[21] This inconsistency also could become prevalent in a U.S. state if its government criminally prosecutes the persons who transfer the virus without a criminal statute that specifically addresses the issue.

Acknowledging inconsistency as a possible problem, twenty-four U.S. states have enacted laws criminalizing the intentional transfer of HIV.[22] As a result, prosecutors more freely charge defendants with the crime of transmitting HIV, or elevate traditional assault or rape charges to attempted murder if the defendant knew he was putting the victim at risk of contracting the virus.[23]

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17. *Top Court, supra* note 10, at A14; *see also* Regina v. Ssenyonga 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993); Regina v. Thornton, 82 C.C.C.3d 530, 533 (1993) (Can.); Regina v. Mercer, 84 C.C.C.3d 41, 49 (Nfld. Ct. App. 1993).

18. Mike McKee, *Violators Face Court-Martial; G.I.'s with AIDS Forced to Tell Partners and Others*, LEGAL TIMES, Mar. 16, 1992, at 2; Salamone, *supra* note 4, at A1.

19. McKee, *supra* note 18, at 2; Salamone, *supra* note 4, at A1.

20. *See, e.g.*, Barlow v. Superior Court, 236 Cal. Rptr. 134, 140 (Ct. App.), *review denied and opinion ordered depublished*, May 26, 1987.

21. *See* Regina v. Thornton, 82 C.C.C.3d 530, 540 (1993) (Can.); Regina v. Mercer, 84 C.C.C.3d 41, 55 (Nfld. Ct. App. 1993); Regina v. Ssenyonga, 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993); Regina v. Ssenyonga, 73 C.C.C.3d 216, 224 (Ont. Prov. Div. 1992).

22. Blackwell, *supra* note 4, at B1; Milling, *supra* note 12, at C1.

23. Salamone, *supra* note 4, at A1; Milling, *supra* note 12, at C1; Josh Meyer, *Women Fear Rape Suspect May Have Given Them HIV*, L.A. TIMES, Jan. 10, 1994, at A1.

This Note addresses several issues regarding criminalizing the transfer of HIV. Part II discusses how various countries have dealt with the outbreak. Part II also examines the arguments in favor of and against criminalization, focusing on the strategies of Canada and the United States. Part III gives an overview of the principal Canadian cases that have addressed the issue, and illustrates how Canada's exclusive common law interpretations have resulted in an inconsistent body of law. Part III also analyzes the principal Canadian cases to determine how different courts built upon traditional criminal law to arrive at verdicts. Part IV considers U.S. state statutes that have outlawed the intentional transfer of HIV as models for possible Canadian legislation. Part V examines the drawbacks of codified criminalization of transmitting HIV. Part VI concludes that Canada needs to enact legislation addressing the intentional transfer of HIV if it is to better ensure justice.

II. STRATEGIES WORLDWIDE TO COMBAT HIV

AIDS in the courtroom is a very new phenomenon to the world, and legal precedent is scarce. It is only now that legislation and legal battles are establishing precedent to deal with this issue. Jim Kellog, legal director of the Lambda Legal Defense and Education Fund, stated that this precedent-setting power can be dangerous to AIDS victims.[24] The opinions of only a few lawmakers and law-interpreters are forming policies in an area that cannot be clearly defined in the law because it is not even clearly defined in the medical community.[25] As a result, the present political climate of the country in which the transmission occurs determines the treatment of the HIV-carrier in the courtroom.

Several countries exhibit a growing intolerance of those who spread the HIV virus. Unfortunately, a country's dramatic reaction to a new problem can result in a confusing body of law. Although Canada's use of common law to deal with this issue is unique, Canada's inconsistent law is not necessarily unusual in comparison to other countries. In the United States, for example, the federal government has left criminalization of the spread of HIV to the states, which has resulted in a variety of statutory positions across

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24. Susan T. Martin, *The AIDS Battle Moves to the Legal Front*, ST: PETERSBURG TIMES, July 13, 1987, at 1A. The Lambda Legal Defense and Education Fund is the oldest and largest gay legal aid group in the United States. *See id.*

25. *Id.*

the fifty states; moreover, these laws differ from city to city within the same state.[26] Australia's six states and two territories also have different laws dealing with those who are HIV-positive. Some Australian states have no relevant statute, some have statutes that provide for fines and imprisonment for carriers who knowingly expose others to HIV, and a couple go so far as to criminalize the transfer of *any* sexually-transmitted disease.[27]

Inconsistency in Canada and the United States is due in large part to the concern for personal liberty. If personal liberty was less of a concern to the government, courts and legislatures could automatically jail anyone who transferred the virus and thereby simplify the regulation of the crime. For example, Sweden has no special AIDS legislation, but it does have a 1989 law covering all "illnesses dangerous to society."[28] Sweden compels anyone proven to have deliberately infected another with HIV to undergo six months of isolation in a hospital.[29] Countries need to evaluate whether alleviating the threat of AIDS is worth infringing upon their citizens' freedom.

In the other corner, there are countries with serious AIDS problems that do not use the law as a panacea to the epidemic. In 1992, the British Parliament ruled out legal measures to stop people with the HIV virus from having unprotected sex after the British Health Secretary warned the Parliament that a tough legal approach to the problem could drive those who are HIV-positive underground.[30] Similarly, Thailand's approach to fighting AIDS focuses on educating the country's tens of thousands of prostitutes and their customers, rather than on legal constraints.[31]

Supporters and critics debate the issue of whether governments should criminalize the transfer of HIV Whichever policy the country or state promotes, governments need to implement a policy that applies uniformly to ensure justice. Without statutes that address HIV or AIDS, or case law for courts to follow, authorities are likely to charge a defendant with an ill-

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26. Salamone, *supra* note 4, at A1; *see, e.g.*, ARK. CODE ANN. § 5-14-123 (Michie 1994); FLA. STAT. ANN. § 775.0877 (West 1995); GA. CODE ANN. § 16-5-60 (1995); ILL. ANN. STAT. ch. 38, para. 12-16.2 (Smith-Hurd 1995).

27. Mosley, *supra* note 4; Blackwell, *supra* note 4, at B1.

28. Mosley, *supra* note 4.

29. Mosley, *supra* note 4; Blackwell, *supra* note 4, at B1.

30. Mosley, *supra* note 4; Blackwell, *supra* note 4, at B1.

31. Mosley, *supra* note 4; Blackwell, *supra* note 4, at B1.

defined crime, and thereby implement a random judicial process.

III. THE CANADIAN STRATEGY

Canada's strategy to hinder the spread of HIV is unique. Canada is the only western country that imprisons those found guilty of spreading HIV without any laws on its books specifically addressing the issue.[32] Members of Canada's courts apparently have taken it upon themselves to act as public health officials regarding the spread of the virus.

There are no statutes on point, but several Canadian judges have interpreted some very general, and traditional, criminal laws to encompass, and therefore criminalize, the transfer of HIV These laws predate the "AIDS scare," so the writers of these laws could not have had HIV in mind when they drafted the laws.[33] Instead, Canadian courts rationalize that the carriers of HIV are such a threat to the public health that the courts must take a stand if the legislature will not do so.[34]

Using a strictly common-law-developed approach to the HIV problem opens the door to inconsistent application of the law. It is unclear how Canadian courts will rule on the next case that deals with the intentional or reckless transfer of HIV because different courts have used different rationales to criminalize the transfer of the virus.[35] Each judge is quick to distinguish the holdings of higher courts and completely ignore the holdings of other jurisdictions.[36]

A. Overview of Canadian Cases

There are four principal Canadian cases that address the

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32. Mosley, *supra* note 4.

33. *See, e.g.,* Criminal Code, R.S.C., ch. C-46, §§ 180, 221, 271 (1985) (Can.).

34. *See generally* Regina v. Thornton, 82 C.C.C.3d 530 (1993) (Can.); Regina v. Mercer, 84 C.C.C.3d 41 (Nfld. Ct. App. 1993) (holding that judges may interpret tangential criminal statutes to convict defendants for their abhorrent conduct even though there are no Canadian statutes that directly outlaw the conduct).

35. Regina v. Thornton, 82 C.C.C.3d 530, 532 (1993) (Can.); Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995); Regina v. Mercer, 84 C.C.C.3d 41, 55 (Nfld. Ct. App. 1993).

36. Regina v. Thornton, 82 C.C.C.3d 530, 532 (1993) (Can.); Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995); Regina v. Mercer, 84 C.C.C.3d 41, 55 (Nfld. Ct. App. 1993); Regina v. Ssenyonga, 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993).

intentional transfer of HIV[37] Due to the significantly different results and manners of analysis applied in each case, there is little consistent precedent. The public expected *Regina v. Ssenyonga*[38] to establish a much needed precedent.[39] This case represented the first time in Canada that a person accused of knowingly spreading HIV went to full trial.[40] Canadian authorities charged Charles Ssenyonga with public nuisance, three counts of aggravated assault and three counts of criminal negligence.[41] The judge threw out the public nuisance charge at the preliminary hearing because he determined that Ssenyonga had not endangered the public at large.[42] Then, after holding that the transfer of HIV does not vitiate consent, a judge in the Ontario Court General Division acquitted Ssenyonga of the aggravated assault charges.[43] The victim's consent to sexual relations with the defendant, whether she was aware of the defendant's disease or not, was not vitiated by her exposure to HIV[44] Moreover, the court held that the sexual assault section of the Criminal Code was not designed to deal with cases of "ordinary" sexual relations.[45]

There had never been a judicial decision, however, regarding the charge of criminal negligence.[46] Two weeks before an Ontario Court of Appeal judge was to decide the criminal negligence charges, Ssenyonga died of complications associated with AIDS.[47] The judge refused to make a ruling only to establish precedent, and the provincial Crown would not appeal without a defendant.[48]

In *Regina v. Thornton*,[49] the court reached a decision, although it applied a very different analysis than the Ontario courts

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37. Regina v. Thornton, 82 C.C.C.3d 530, 532 (1993) (Can.); Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995); Regina v. Mercer, 84 C.C.C.3d 41, 55 (Nfld. Ct. App. 1993); Regina v. Ssenyonga, 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993).

38. Regina v. Ssenyonga, 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993).

39. Joe Ruscitti, *Province Rejects Appeal of AIDS Case*, WINDSOR STAR, Jan. 17, 1994, at A10.

40. *Id.*

41. Regina v. Ssenyonga, 73 C.C.C.3d 216, 217 (Ont. Prov. Div. 1992).

42. *Id.* at 224.

43. Regina v. Ssenyonga, 81 C.C.C.3d 257 (Ont. Gen. Div. 1993).

44. *Id.* at 266.

45. *Id.*

46. *Id.*

47. Lawrence Greenspon, *Justice is Not Served by Trying a Corpse*, VANCOUVER SUN, Aug. 18, 1993, at A14; Ruscitti, *supra* note 39, at A10.

48. Greenspon, *supra* note 47, at A14; Ruscitti, *supra* note 39, at A10.

49. Regina v. Thornton, 82 C.C.C.3d 530, 530 (1993) (Can.).

in the *Ssenyonga* case. In *Thornton*, different statutes and facts were at issue. First, the defendant's alleged "crime" was donating blood while he was infected with HIV.[50] Second, the defendant never actually transferred HIV because the blood bank found the virus before it distributed the blood to the public.[51] Third, the court convicted the defendant of a common nuisance.[52]

The *Thornton* court ignored the issue of consent that was at the heart of the *Ssenyonga* court's analysis.[53] This disregard of the consent issue most likely was intended to avoid deciding whether a health care worker consents to possible exposure to HIV by taking the job. Instead, the *Thornton* court held that the *donation* of blood infected with HIV, not the transfer of the virus to another party, is the "unlawful act" under common law and therefore subject to criminal penalty.[54]

Thornton was helpful, however, in addressing the legitimacy of using tangential common law when there exists no statute that directly criminalizes a defendant's conduct.[55] In *Ssenyonga*, the judge did not explain why he freely used common law. The judge focused more on the public policy behind a need for his decision, rather than on the right of the court to make such a decision.[56]

In the third case, *Regina v. Mercer*, the Newfoundland Court of Appeal emphasized the seriousness of the intentional spread of HIV to justify increasing the sentence of a defendant who pleaded guilty to criminal negligence.[57] Although the court had already convicted the defendant of intentionally exposing others to HIV based on his plea, it conducted a lengthy analysis of the legitimacy behind using criminal negligence to outlaw this behavior.[58]

The court convicted Mercer of criminal negligence because of his reckless conduct that led to his transfer of the virus.[59] The court would not apply the crime of common nuisance to the defendant's conduct because it was unwilling to criminalize the

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50. *Id.* at 532.
51. *Id.*
52. *Id.*
53. *See id.* at 530; *see, e.g.*, Regina v. Ssenyonga, 81 C.C.C.3d 257 (Ont. Gen. Div. 1993).
54. Regina v. Thornton, 82 C.C.C.3d 530, 533 (1993) (Can.).
55. *Id.* at 533-35.
56. Regina v. Ssenyonga, 81 C.C.C.3d 257, 265-66 (Ont. Gen. Div. 1993).
57. Regina v. Mercer, 84 C.C.C.3d 41, 54-58 (Nfld. Ct. App. 1993).
58. *Id.*
59. *Id.* at 42.

transfer of HIV[60] This rationale is in direct contrast to the holding in *Thornton*, where even the mere *threat* of transfer was criminalized.[61]

In the most recent case to deal with this situation, *Regina v. Cuerrier*,[62] the Crown again tried to convict a defendant for criminal assault based on the defendant's consensual sexual activity. As in *Ssenyonga*, the court found that the defendant was not guilty of aggravated sexual assault even though he lied to his partner about his HIV status.[63] In *Cuerrier*, the British Columbia Supreme Court held that Cuerrier's HIV status is irrelevant to the issue of consent.[64]

In all four cases, the courts acknowledged the inexcusable behavior of the defendants.[65] Yet, because of the ill-defined nature of the law, the courts only convicted one of the three defendants who engaged in sexual relations while knowingly carrying the virus.[66] Furthermore, a court convicted Thornton, who donated blood without transmitting the virus, even though the Canadian public would probably find his behavior to be less egregious than that of Ssenyonga or Cuerrier.

The problem is that without consistent precedent, the courts use different statutory "crimes" or common law precedent to criminalize the conduct. There are three consequences to this inconsistency. First, some judges are unwilling to convict a defendant, who obviously has committed a wrong, because there is no statute or common law precedent that truly addresses the situation.[67] Second, some judges are more likely to convict on the

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60. *Id.*

61. Regina v. Thornton, 82 C.C.C.3d 530, 533-35 (1993) (Can.).

62. Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995).

63. *Id.*

64. *Id.*

65. Regina v. Mercer, 84 C.C.C.3d 41, 64 (Nfld. Ct. App. 1993) (describing the defendant's conduct "atrocious"); Regina v. Ssenyonga, 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993) (stating that people should not be permitted to hide their HIV status from their sex partners and if the Criminal Code fails to punish such conduct, then Parliament should pass new legislation); Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995) (predicting that "many will undoubtedly find the actions of the accused in this case repugnant and deserving of punishment," before acquitting the defendant because of lack of applicable law); Regina v. Thornton, 82 C.C.C.3d 530, 540 (1993) (Can.) (categorizing the defendant's conduct as "among the worst offenses" and "verg[ing] on the unspeakable").

66. *Mercer*, 84 C.C.C.3d at 41.

67. *Cuerrier*, 26 W.C.B.2d at 378.

basis of their "personal" views than on the egregiousness of the defendant's conduct, resulting in inconsistent convictions. Third, the confusion dilutes one of the main purposes of the judicial system—deterrence. Threat of prosecution is unlikely to deter the public if the elements of the crime are so loosely defined. Thus, it is not clear when Canada will label the intentional or reckless exposure of HIV as "criminal."

B. A History of Canadian Common Law Interpretations of HIV Transmission

In January 1991, a Canadian court, for the first time, officially considered the HIV-positive status of a defendant.[68] The defendant pleaded guilty to the crime of sexual assault on an eight-year-old boy. Although the boy had not contracted HIV at the time of trial, the judge considered the HIV-positive status of the defendant as a serious factor when he sentenced the defendant.[69] The British Columbia Court of Appeals upheld the maximum penalty of ten years imprisonment for sexual offenses against children, based on the nature of the crimes, their frequency, the use of videotaping the victim and the fact that the defendant was aware of his HIV status while he committed the crimes.[70]

Significantly, Cormier's risky conduct, rather than the resulting transmission of HIV, aggravated his sentence.[71] The defendant in *Thornton*, one of the few defendants in the HIV cases to be convicted of a crime for carrying on normal activity while HIV-positive, was convicted for the risky conduct of donating "tainted" blood.[72] There was no transmission of HIV as a result of his conduct, however, because nobody distributed the blood to the public. The *Mercer* court was also unwilling to criminalize the actual transfer of the virus. It was the defendant's engagement in sexual relations with women without telling them about his known HIV status that the court considered to be criminally negligent.[73]

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68. Regina v. Cormier, 12 W.C.B.2d 336 (B.C. Ct. App. 1991).
69. *Id.* at 337.
70. *Id.*
71. *Id.*
72. Regina v. Thornton, 82 C.C.C.3d 530, 539-40 (1993) (Can.).
73. Regina v. Mercer, 84 C.C.C.3d 41, 42 (Nfld. Ct. App. 1993).

1. *Regina v. Ssenyonga*

Canada has used various arguments to imprison or fine people for transmitting HIV. In *Ssenyonga*, the defendant engaged in sexual intercourse with three women without using a condom after he tested positive for HIV.[74] The Crown tried to prosecute the defendant under several theories: the defendant committed three counts of sexual assault; three counts of administering a noxious thing; and three counts of committing a common nuisance.[75] The Crown's arguments illustrate different views regarding the blameworthiness of the carriers of the virus.

a. The Effect of Consent in a Sexual Relationship

The count of sexual assault utilizes a traditional tort theory of consent. In *Ssenyonga*, all three of the defendant's partners willingly consented to sexual intercourse with the accused on every occasion.[76] All three women also were aware of the existence and threat of AIDS while carrying on their relationships with the defendant. Finally, all three women were infected with HIV.[77]

The Crown tried to prove that all three partners were sexually assaulted because the defendant's nondisclosure of his HIV status invalidated their consent to sexual intercourse.[78] The consent was vitiated by fraud because the risk inherent in any sexual activity with the defendant is so grave that it "lies outside of the ambit of consent to sex per se."[79] The issue is the scope of what an individual consents to when he or she agrees to engage in sex with a partner.

On the one hand, the spread of AIDS and other sexually transmitted diseases is so widespread and publicized by the media and the health community, one could assume that a person accepts the risk of contracting a disease when he or she consents to sex. In the cases this Note discusses, the women were all equal partners in the relationship; therefore, they should take equal responsibility for what happened.

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74. Regina v. Ssenyonga, 81 C.C.C.3d 257, 258-59 (Ont. Gen. Div. 1993).
75. *Id.*
76. *Id.*
77. *Id.* at 259.
78. *Id.* at 259-60.
79. Regina v. Ssenyonga, 81 C.C.C.3d 257, 259 (Ont. Gen. Div. 1993).

The Crown argued, however, that consenting to sex does not include "consent" to the risk of deadly results from the sexual contact.[80] Even if the community at large knows of the risk of AIDS, public policy dictates that the consent should be vitiated because the probability and immediacy of harm from unprotected vaginal intercourse with an HIV-positive person is so serious.[81] Although the legal argument here is based primarily on public policy, other areas of law endorse this argument. As an intentional hit to the back of the neck might exceed the implied consent to the risk of injury in a hockey game,[82] the known presence of HIV is so inherently dangerous that sex with someone who is HIV-positive extends beyond the norm of conduct that a person should expect from partaking in the activity.[83]

The Canadian courts have not agreed with the Crown's interpretation of "consent." Sexual relations, historically a private matter, have been outted by the AIDS epidemic.[84] As a result, one can no longer separate the relationship itself from the risks associated with it. The problem with this policy is that it in effect "criminalizes" those involved in sexual relationships. Instead of deterring people with HIV from engaging in sex without first telling their partner, the policy blames the partner for engaging in the activity.

b. The Old View of Consent

Transmitting a venereal disease to another person was a criminal offense in Canada until the Parliament repealed the 1985 Criminal Law Amendment Act.[85] English common law, often used as precedent in Canadian courts, addressês vitiating consent to sexual activity when dealing with venereal diseases.[86]

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80. *Id.*

81. Regina v. Lee, 3 O.R.3d 726, 728 (Ont. Gen. Div. 1991).

82. Regina v. Leclerc, 67 C.C.C.3d 563, 568-69 (Ont. Ct. App. 1991).

83. Terrah Keener, a representative of AIDS Vancouver, said that unless the defendant committed rape, the prosecution of one of two consenting sexual partners raises questions of dual responsibility. *Spreading AIDS Criminal, supra* note 4, at B16.

84. Kathleen Byrne, *Victims of AIDS "Charmer" Live Without Justice*, FIN. POST, Apr. 22, 1995, at 28.

85. Criminal Law Amendment Act, S.C., ch. 19, § 42 (1985) (Can.).

86. Regina v. Vantandillo, 4 M. & S. 73 (1815) (Eng.); Regina v. Burnett, 4 M. & S. 272 (1815) (Eng.); Regina v. Bennett, 4 F & F 1105 (Assize) (1866) (Eng.); Regina v. Sinclair, 13 Cox C.C.28 (C.C.C.) (1867) (Eng.); Regina v. Ssenyonga, 81 C.C.C.3d 257, 259 (Ont. Gen. Div. 1993).

In *Ssenyonga*, the Crown pointed out that the traditional rule in England regarding venereal diseases is that if deception causes a misunderstanding as to the nature of the act itself, there is no legally recognized consent because the act was beyond the scope of that to which the partner consented.[87] If the deceit relates merely to some collateral matter, rather than the act being done, this consent induced by fraud is as effective as any other consent.[88]

This interpretation of consent fell out of favor when Canadian courts began to rule on the transmission of HIV through sexual relationships. In a 1991 case, *Regina v. Lee*, the defendant argued that the fact that he was HIV-positive was collateral to the sexual act because the complainants did not misunderstand the nature of the act of unprotected sexual intercourse.[89] A trial judge in the General Division of Canada agreed with the defendant's argument, and acquitted him.[90] This was one of the first judges to hear, and agree with, the argument that consent to sexual relations includes consent to the risk of a sexually transmitted disease.[91] Although most Canadian courts did not rely on *Lee* as precedent,[92] this decision foreshadowed future higher courts' rulings regarding consent to sexual relationships.

The lower court judge in *Ssenyonga* made it clear that he was not bound to the questionable decision of the *Lee* court.[93] Although he could have considered *Lee* as persuasive because of the lack of cases in this field in Canada, he did not. Instead, the court distinguished *Ssenyonga* from *Lee*, holding that in *Lee* there was insufficient evidence to show that the defendant was absolutely aware that he was infected with HIV.[94] The trial judge in *Ssenyonga* was unwilling to embrace the view of consent in *Lee* when he determined that the *Lee* court had acquitted the defendant based on a lack of intent.[95]

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87. Regina v. Ssenyonga, 81 C.C.C.3d 257, 259 (Ont. Gen. Div. 1993).
88. *Id.* at 261.
89. Regina v. Lee, 3 O.R.3d 726, 728 (Ont. Gen. Div. 1991).
90. *Id.*
91. *Ssenyonga*, 81 C.C.C.3d at 264.
92. Regina v. Ssenyonga, 73 C.C.C.3d 216, 218-19 (Ont. Prov. Div. 1992).
93. *Id.*
94. *Id.* at 219.
95. *Id.*

c. Knowledge Equals Intent

Ssenyonga established that the defendant must be aware of his HIV status to be held responsible for the effects of the virus.[96] This suggests that the courts equate blameworthiness with engaging in sex while being aware of the risks. By only criminalizing intentional, risky conduct, the courts are punishing a defendant for a guilty mind, rather than focusing on the protection of the populace.

If the Canadian courts' purpose is to find the defendant guilty in order to stop the spread of AIDS, holding people criminally responsible for passing HIV, whether they are aware that they carry the virus or not, would be a better deterrent. With all of the warnings of AIDS in the community, an excuse of ignorance seems contrary to public policy. It may also discourage people who are at risk from stepping forward to be tested because a positive test would establish the requisite intent. The courts' refusal to impose such a harsh policy against someone who was not aware of his HIV status could reflect that punishment of the guilty-minded represents the driving motivation of the courts, not general deterrence. On the other hand, it could merely show the courts' unwillingness to prioritize deterrence above compassion for AIDS victims.

d. Administering a Noxious Thing

In the *Ssenyonga* preliminary inquiry, the Crown also charged the defendant with administering a noxious thing with the intent to endanger life contrary to section 245 of the Criminal Code.[97] According to the Crown, semen containing HIV is "noxious."[98] The Crown further argued that although there was no evidence that the accused specifically intended to harm the complainants, the defendant should have known that harm to sexual partners could result from unprotected sex, and that such recklessness is synonymous with intention.[99]

The court, however, disagreed with the Crown on the issue of administering a noxious thing. The court held that there was no evidence that the accused could have foreseen the certainty, or

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96. *Ssenyonga*, 81 C.C.C.3d at 259.
97. Regina v. Ssenyonga, 73 C.C.C.3d 216, 222 (Ont. Prov. Div. 1992).
98. *Id.*
99. *Id.*

substantial certainty, of infecting the complainants with HIV by having unprotected sex with them.[100] This decision established the *mens rea* required for section 245 of the Canadian Criminal Code.[101]

e. Common Nuisance

At the preliminary inquiry, the Crown also argued that the transfer was a common nuisance, contrary to Criminal Code Section 180. The court distinguished its case from others in which a common nuisance occurred because the defendant "did not offer himself to the general public."[102] The Crown successfully made the common nuisance argument at the lower court level in *Thornton*, where the defendant was convicted for common nuisance to the public.[103] The defendant appealed the holding, but the Supreme Court of Canada dismissed the appeal.[104] Hence, several judges have agreed on the application of common nuisance to the transfer of HIV; however, in *Regina v. Mercer*, a more recent case to deal with this issue, the judge disregarded this analysis.[105]

2. *Regina v. Thornton*

a. AIDS Infection as a Public Nuisance

Section 216 of the Criminal Code provides that everyone who undertakes to administer surgical or medical treatment to another person is, except in cases of necessity, under a legal duty to use reasonable knowledge, skill and care in the undertaking.[106] In *Regina v. Thornton*, the defendant twice tested positive for HIV, which he knew could lead to AIDS.[107] Despite this knowledge, the defendant donated blood to the Canadian Red Cross. The Supreme Court of Canada found that the presence of HIV in someone's blood indicates that the person is probably infected with

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100. *Id.*
101. *Id.*
102. Regina v. Ssenyonga, 73 C.C.C.3d 216, 224 (Ont. Prov. Div. 1992).
103. Regina v. Thornton, 82 C.C.C.3d 530, 540 (1993) (Can.).
104. *Id.*
105. Regina v. Mercer, 84 C.C.C.3d 41, 55 (Nfld. Ct. App. 1993).
106. Criminal Code, R.S.C., ch. C-46, § 216 (1985) (Can.), *construed in*, Regina v. Thornton, 82 C.C.C.3d 530, 531 (1993) (Can.).
107. Regina v. Thornton, 82 C.C.C.3d 530, 531 (1993) (Can.).

AIDS.[108] The Court pronounced that the dangers of AIDS, and the ways it can be transferred, are well known so the defendant must have known of the threat when he donated blood. Therefore, he had the requisite intent for public nuisance.[109]

The Supreme Court of Canada made many presumptions in finding that the defendant was guilty of a public nuisance. First, it presumed that the defendant was aware that donating blood to the Red Cross would threaten the safety of the public. Second, the court made an argument that no other Canadian court has examined: that the defendant should have known that his donation of blood was a threat to the public because his status as a gay man made him a member of a high-risk group.[110] Giving the defendant this extra responsibility to the public because he was a gay man was an unnecessary assumption because the defendant already knew that he was HIV-positive, thereby making his so-called "risky" status irrelevant. The Court suggested that a gay man owes a higher standard of care to the public.

The Court appeared to establish an argument that prosecutors can use if a gay defendant transfers HIV without any real knowledge of his HIV status. This hypothetical situation assigns criminal intent to someone for being gay while carrying on normal activities, including activities of good samaritanism like donating blood.

This case was significant in that the defendant knew that the Canadian Red Cross collected blood for transfusions and that the Red Cross would not knowingly accept donations of blood from those who tested positive for HIV antibodies.[111] Authorities charged the defendant with violating section 176(a) of the Criminal Code (now section 180) because he "intentionally withh[eld] the information from the Canadian Red Cross Society."[112]

The defendant argued that he may not have made his status clear, or filled out the questionnaire completely, but that this is not enough to make him guilty of a criminal offense. The defendant based his arguments on three main premises: (1) even if his conduct was reprehensible, it does not amount to an offense known to law; (2) his conduct did not endanger the lives or health of the

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108. *Id.*
109. *Id.* at 540.
110. *Id.* at 531.
111. *Id.* at 532.
112. Criminal Code, R.S.C., ch. C-34, § 176(a) (1970) (Can.) (repealed 1985), *construed in*, Regina v. Thornton, 82 C.C.C.3d 530, 532 (1993) (Can.).

public; and (3) he did not have the necessary *mens rea*.[113]

Section 180(1) of the Criminal Code reads as follows: "[e]veryone who commits a common nuisance and thereby (a) endangers the lives, safety or health of the public, or (b) causes physical injury to any person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."[114] Section 180(2) establishes that a person commits a common nuisance if he or she does an unlawful act or fails to discharge a legal duty and thereby, "(a) endangers the lives, safety, health, property or comfort of the public; or (b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada."[115]

First, the defendant argued that even if some may find his conduct irresponsible, or even reprehensible, this is not the type of action that should be regulated or criminalized by law.[116] Section 180(2) states that to commit a common nuisance, an "unlawful act" needs to occur.[117] The Canadian Criminal Code does not outlaw the donation of contaminated blood. The defendant interpreted "unlawful act" to mean an act that has been specifically restricted by legislation.[118] Therefore, the donation of blood could not constitute a crime of common nuisance.

b. Judicial Recognition of the Lack of Statutory Law on Which to Base a Decision

The defendant argued that the courts cannot criminalize the transfer of HIV without specifically prescribed legislation.[119] Although the court agreed that without legislation the transfer of HIV cannot be unlawful conduct, it also held that specific legislation is unnecessary to find the defendant's conduct criminal.[120] Because this is a very recent legal issue, there is no history of criminalizing this conduct. Apparently, however, many Canadian courts seek to take it upon themselves to protect the populace

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113. Regina v. Thornton, 82 C.C.C.3d 530, 532 (1993) (Can.).
114. Criminal Code, R.S.C., ch. C-46, § 180 (1985) (Can.), *quoted in*, Regina v. Thornton, 82 C.C.C.3d 530, 532 (1993) (Can.).
115. *Id.*
116. *Thornton*, 82 C.C.C.3d at 532.
117. *Id.* at 533.
118. Criminal Code, R.S.C., ch. C-46, § 180 (1985) (Can.).
119. Regina v. Mercer, 84 C.C.C.3d 41, 49 (Nfld. Ct. App. 1993).
120. *Id.* at 42.

from AIDS, rather than wait for the Parliament to pass protective law.

There are no cases that have ruled on whether "unlawful conduct" or "legal duty" as defined under section 180(2) must be a duty imposed by statute, or whether it can be a duty in the tradition of common law. Instead, the *Mercer* court looked to past interpretations of duty and conduct in cases that involved criminal negligence.[121] Section 219(1) states that everyone is criminally negligent who is "(a) doing anything, or (b) omitting to do anything that is his duty to do, or that shows wanton or reckless disregard for the lives or safety of other persons."[122] The *Thornton* court stated that for the purposes of this section, "duty means a duty *imposed by law.*"[123] The interpretations of this negligence statute become the precedent for the interpretation of common nuisance even though they are separate crimes and the wording of their relevant statutes are quite different.

The court has interpreted section 219, regarding criminal negligence, to give the court discretion to criminalize the spread of HIV There would be no statutory basis for determining just what is "unlawful" under the law.[124] In 1981, a Canadian court held that a parent is guilty of criminal negligence under section 219 if the parent is under a legal duty *at common law* to take reasonable steps to protect his or her child from violence at the hands of a third person.[125] Thus, a common law duty is a "duty imposed by law" within the meaning of section 219

In *Thornton*, the court ruled that even though the duties involved in criminal negligence and common nuisance are not the same, they "have exactly the same meaning."[126] Therefore, a court can enforce a legal duty without a statutory basis in cases dealing with common nuisance under section 180. The court, however, does not address why the legal duty has exactly the same meaning. Common nuisance does not have the tradition of interpretation by the courts that negligence does, especially when interpreting the donation of blood as a new form of common nuisance.

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121. *Id.* at 534-36.
122. Criminal Code, R.S.C., ch. C-46, § 219 (1985) (Can.).
123. Regina v. Thornton, 82 C.C.C.3d 530, 534 (1993) (Can.) (emphasis added).
124. *Id.*
125. Regina v. Popen, 60 C.C.C.2d 232, 240 (Ont. Ct. App. 1981).
126. *Thornton*, 82 C.C.C.3d at 534.

Once the court in *Thornton* defined common nuisance in common law, it needed to determine whether there was a common law duty that would prohibit a person from donating blood if that person is HIV-positive. Without any precedent in criminal law, the court again drew conclusions from another area of law. The court looked to tort law to find that common law in this area has traditionally recognized the fundamental duty of a person to refrain from conduct that could cause injury to another person.[127] From this theory, the court found that the defendant had a legal duty to refrain from giving blood because it was reasonably foreseeable that the donation could cause harm to another person.[128]

The court makes a large leap when it compares refraining from intentionally causing injury, to the act of donating blood. First, the court cited two cases in which exposing someone to a contagious disease constituted a common nuisance.[129] The court was unable to cite these cases as authority, however, because section 9(a) of the Canadian Criminal Code abolished this common law offense.[130] This passage of the updated Criminal Code illustrates the Canadian Parliament's move away from stigmatizing the sick with threats of incarceration.

Thornton also argued that his actions did not meet the basic definition of a common nuisance because his blood donation did not endanger the health or lives of the public. Thornton's argument hinges on the fact that since 1985, the Canadian Red Cross has used an advanced screening technique to eliminate contaminated blood from the donation pool.[131] Because of the screening, Red Cross workers discovered that the defendant's blood was contaminated, and disposed of it.[132] Therefore, the blood never really posed a threat to the public—the first requirement under section 180.

To reject the defendant's argument that his donation was not a threat, the court drew a very broad interpretation of "threat" and "public." The Crown proved that because the screening test is

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127. *Id.* at 535.
128. *Id.* at 536.
129. *Id.* (citing Regina v. Vantandillo, 4 M. & S. 73 (1815) (Eng.); Regina v. Burnett, 4 M. & S. 727 (1815) (Eng.)).
130. Criminal Code, R.S.C., ch. C-46, § 9(a) (1985) (Can.), *construed in,* Regina v. Thornton, 82 C.C.C.3d 530, 532 (1993) (Can.).
131. *See* Bragg, *supra* note 6, at A4.
132. Regina v. Thornton, 82 C.C.C.3d 530, 532 (1993) (Can.).

"only" 99.3% accurate,[133] a threat still existed that the public would use this blood. The court acknowledged that the risk to the public here may be slight; however, when the gravity of potential harm is "catastrophic," as it is here, this minimal danger satisfies section 180.[134] Moreover, the court defined the "public" as being the health care workers who must handle and test the blood at the Red Cross.[135] The latter argument could open the door to serious public policy problems if doctors, nurses, janitors and scientists could all accuse an HIV-infected person if they get the virus after coming in contact with his blood.

The defendant's final argument was that he did not have the requisite *mens rea* of a common nuisance because he did not believe that the blood would reach the public. The defendant claimed that he thought that the Red Cross screening test was 100% effective so it would never use his blood.[136] Supposedly his motive for donating the blood was that he believed he could get rid of the virus by getting rid of his blood. The court rejected the defendant's claim because there was evidence to show that this was not his actual belief or motive.[137] The court did not address whether this would be a legitimate argument if the defendant really believed that the blood would not reach the public. Yet because the court put such emphasis on the risk to the health care workers who handle the blood, the defendant probably would have needed to prove that he did not foresee the threat to the handlers.

The court's attitude regarding those who spread HIV is illustrated in the court's sentencing in *Thornton.* The judge categorized the defendant's crime as among the worst possible offenses, and "verg[ing] on the unspeakable."[138] Rehabilitation is obviously not a motive for long sentences in these cases because the defendants often have short life expectancies. The judge in *Thornton* stated that the purpose of the long jail sentence in this case was to serve as a general deterrent for all people with HIV and to express society's repudiation of the defendant's actions.[139]

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133. *Id.* at 537.
134. *Id.* at 538.
135. *Id.* at 537.
136. *Id.* at 539.
137. Regina v. Thornton, 82 C.C.C.3d 530, 539 (1993) (Can.).
138. *Id.* at 540.
139. *Id.*

3. *Regina v. Mercer*

Raymond Mercer argued that although he pleaded guilty to criminal negligence, the Canadian appellate court should not have increased his sentence because of the lack of precedent to criminalize his conduct in the first place.[140] The court held, however, that the criminal negligence provisions of the Criminal Code are sufficiently broad to encompass the intentional transfer of HIV.[141] Although the court acknowledged the lack of precedent in this area,[142] it gave the defendant the maximum sentence to deter such conduct and to solidify the use of criminal negligence in future cases.[143]

Using the common law interpretation of existing laws to criminalize the transfer of HIV may be more understandable in cases where the defendant's intent is clear. The facts of *Mercer* show that jailing the defendant appeared to be the only way to protect the public from the defendant's virus. Canadian health officials continuously tried to deter Mercer's risky conduct before the court decided that it had to convict the defendant as a criminal.[144]

Originally, a government health official contacted and advised Mercer that he should assume that he was a carrier of HIV because a former partner of his was just diagnosed with the virus. At this time, the health official told the defendant that he should not engage in unprotected sexual intercourse because he could easily transfer the deadly virus. Neither this warning, nor the information that he did indeed test positive for HIV, affected the defendant's behavior.[145]

Immediately after the health official told the middle-aged defendant not to engage in unprotected sex, the defendant began a sexual relationship with a sixteen-year-old girl.[146] He encouraged the girl to engage in unprotected sex with him without warning her of his condition. The defendant even assured the girl that his health was fine when she inquired as to whether they

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140. Regina v. Mercer, 84 C.C.C.3d 41, 49 (Nfld. Ct. App. 1993).
141. *Id.* at 50.
142. *Id.* at 54.
143. *Id.* at 57.
144. *Id.* at 58.
145. Regina v. Mercer, 84 C.C.C.3d 41, 44 (Nfld. Ct. App. 1993).
146. *Id.*

should be using a condom.[147]

Once the defendant had tested positive, the health official called him back into her office. The official asked the defendant for a list of his sex partners so that the health agency could warn them of their chances of getting the virus and tell them to take precautions so that they would not spread the virus any further. The defendant gave the official a list but intentionally left off the name of the minor.[148]

When the health official discovered that the defendant was intentionally threatening the life of this girl, she had him arrested. A court immediately let him out on bail on the condition that he would not engage in unprotected sex with the minor. The defendant not only continued unprotected, sexual relations with the minor, but eventually impregnated the girl thereby putting a baby's health at risk as well.[149]

a. Criminal Negligence

The appellate court sentencing the defendant held that common nuisance was not the appropriate "crime" with which to label the defendant's conduct.[150] Instead, the court established criminal negligence as the appropriate crime because it punishes the risky conduct rather than the actual transfer of the virus. Punishing a defendant for spreading HIV would be a "gross oversimplification" of the problem and would lead to a distortion of the defendant's culpability.[151]

The court also would not compare a case dealing with AIDS to past cases dealing with other communicable diseases. This view suggests one of two things. It may suggest that *Mercer* was a jurisdictional decision. This particular court was not willing to adopt the attitude of other Canadian jurisdictions, which held that courts have an unfettered role in protecting the public against AIDS. On the other hand, *Mercer* may symbolize a general backlash against using common law in this area. Judges throughout Canada may be beginning to feel reluctant about using common law to criminalize the disease except in the most malicious cases.

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147. *Id.*
148. *Id.* at 45.
149. *Id.* at 47.
150. Regina v. Mercer 84 C.C.C.3d 41, 55 (Nfld. Ct. App. 1993).
151. *Id.* at 58.

Either way, the conviction and sentencing depend on the currently presiding judge, rather than case precedent or statutes regarding the transfer of HIV

Section 221 of the Canadian Criminal Code, which states that everyone who by criminal negligence causes bodily harm to another person is guilty of an indictable offense and liable to imprisonment for a term not exceeding ten years, affirms the appropriateness of the defendant's conviction.[152] There are two components to the offense: (1) an act of criminal negligence, which section 219 defines as showing wanton or reckless disregard for the lives and safety of other persons; and (2) causing bodily harm to another by the offender's act or omission.[153]

The court only considers the defendant's conduct criminal if it is serious enough to be considered criminal negligence because the court will not criminalize the actual spreading of the virus. The court considers a conviction for spreading HIV as analogous to a conviction of a reckless driver for driving the car, rather than for acting recklessly.[154] It will only convict a defendant for spreading HIV if reckless and wanton behavior infects another person with the virus.[155]

b. The Common Law Crime Used Reflects the Courts' Attitude

Although the *Mercer* court's language seems to remove some of the blame from a person for having the disease—by holding that it is the conduct, not the transfer, which is criminal—its ruling actually could have the opposite effect. The court states that it does not want to follow the lead of other courts by criminalizing someone for spreading the HIV virus.[156] Instead, it criminalizes reckless conduct.[157] The *Ssenyonga* and *Thornton* courts, however, also could have used criminal negligence instead of common nuisance to prosecute the defendants. Although convicting the transferrer of HIV is more likely when the court labels the conduct as common nuisance, this result is only because the label of "common nuisance" is a less serious crime than "criminal negligence."

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152. Criminal Code, R.S.C., ch. C-46, § 221 (1985) (Can.).
153. *Id.*
154. Regina v. Mercer, 84 C.C.C.3d 41, 56 (Nfld. Ct. App. 1993).
155. *Id.* at 62.
156. *Id.* at 58.
157. *Id.*

The sentences prescribed for certain crimes illustrate how serious the legislature considers the violation. After a surface reading of *Thornton*, the court seemingly applied a strict view by convicting the defendant for putting health care workers at risk, and creating a theoretical (if not actual) risk to the public at large. When examined more closely, however, the facts show that the maximum penalty for putting the public at risk, and thereby causing a common nuisance, is only two years.[158] On the other hand, the maximum penalty for committing criminal negligence is ten years.[159] The court in *Mercer* would not even consider the sentence rendered in *Thornton* because the crime in *Mercer* was significantly more severe.[160]

If courts only convict defendants for criminal negligence in cases factually similar to *Mercer*, where the defendant insists on harming somewhat vulnerable parties, the move toward conviction based on this crime appears quite justified. On the other hand, if the court did not consider common nuisance in *Mercer* because it intended to claim that the spread of HIV is always, or usually, caused by reckless or wanton behavior, the courts are taking a very deliberate stance against the spread of the virus without any legislation to back it.

4. *Regina v. Cuerrier*

As the most recent Canadian case to address the intentional transfer of HIV, *Regina v. Cuerrier*[161] reflects the most probable result for future cases. As in *Ssenyonga* and *Mercer*, the defendant had unprotected sex with two women without telling them he was HIV-positive.[162] A public health nurse told Cuerrier that he had the HIV virus and instructed him to wear a condom if he chose to engage in sex.

Unlike in *Mercer*, however, the court acquitted the defendant of all charges brought against him.[163] The British Columbia Supreme Court would not convict Cuerrier based on the aggravated assault charges brought by the Crown. The Court held that "many will undoubtedly find the actions of the accused in this case

158. *Id.* at 55.
159. Regina v. Mercer, 84 C.C.C.3d 41, 55 (Nfld. Ct. App. 1993).
160. *Id.*
161. Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995).
162. *Id.*
163. *Id.*

repugnant and deserving of punishment," but it could not stretch the offense of assault to this situation.[164]

The Canadian public was so outraged by the decision that the Parliament is finally, and seriously, considering legislation that directly outlaws this type of conduct.[165] Cuerrier's attorney stated that only the Parliament can resolve this problem. He further suggested that Canada may have to follow the United States' lead in this area of legislation.[166]

IV THE U.S. STRATEGY

Today, Canada is one of the only countries consistently to use common law to convict potential transferrers of HIV.[167] The Canadian courts, however, are not the only courts in the western world to try to prosecute people this way. Initially, district attorneys and state judges in the United States were wary of using common law legal strategy to convict transferrers of attempted murder.[168] Many prosecutors worried about infringing on the privacy of the defendants.[169] Those state prosecutors who did try to use common nuisance to convict defendants often found that state judges were not willing to use traditional common law without precedent of these laws being used against HIV-carriers.[170]

A. U.S. History of Illegal Transfer of HIV

In 1987, in *Barlow v. Superior Court of San Diego County*, a California prosecutor attempted to convict a defendant for attempted murder after he bit two San Diego police officers.[171] The government suspected that the defendant knew he carried HIV at the time of the assault. The California Court of Appeal, however, would not accept that biting someone while being aware of HIV status meant that there was an intent to commit murder or great bodily injury.[172] The court looked to California statutory

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164. Larry Still, *Parliament Must Rule on HIV Carriers, Lawyer Says*, VANCOUVER SUN, Mar. 9, 1995, at B1.

165. *Id.*

166. *Id.*

167. Bragg, *supra* note 6, at A4.

168. Salamone, *supra* note 4, at A1.

169. *Id.*

170. Barlow v. Superior Court, 236 Cal. Rptr. 134, 140 (Ct. App.), *review denied and opinion ordered depublished*, May 26, 1987.

171. *Id.* at 135.

172. *Id.* at 140.

law that dealt with transmittable diseases to make its determinations.[173]

The California court dealt with the transfer of HIV in three distinct ways from the Canadian courts. First, the California Court of Appeal would not consider elevating the crime because the defendant was HIV-positive unless there was conclusive evidence that the defendant actually infected the police officers.[174] The Canadian courts did not focus on the actual transfer of the virus. Instead, Canadian judges focused on the risk the HIV-positive defendant inflicts on the public by possibly exposing others.[175] Second, the California court held that the state must show that the transferrer of the HIV virus must have intended to kill or cause serious bodily harm.[176] Lastly, the California court was not willing to read a public safety exception into state laws that guard the privacy of HIV-positive individuals.[177] Prosecutors argued that the state legislature did not intend to shield those who harbor the HIV virus from criminal liability when they intentionally expose others to the virus. Specifically, prosecutors argued that the courts should not apply the Acquired Immune Deficiency Syndrome Research Confidentiality Act,[178] which protects the confidentiality of records maintained in AIDS research, in cases where the defendant's HIV status makes him or her more culpable.[179] The California Court of Appeal disagreed with this argument.[180]

The Court of Appeal held that taking away rights given to HIV-carriers by legislation would require the court to create an exception to the legislation. The court did not take that strong a role here because it did not find that the possible infliction of the virus through biting constituted an actual threat to public health and safety.[181] The court based its decision on the fact that the

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173. *Id.* at 138-39.

174. *Id.* at 138.

175. Regina v. Ssenyonga, 81 C.C.C.3d 257, 265 (Ont. Gen. Div. 1993); Regina v. Thornton, 82 C.C.C.3d 530, 540 (1993) (Can.); Regina v. Mercer, 84 C.C.C.3d 41, 56-57 (Nfld. Ct. App. 1993).

176. Barlow v. Superior Court, 236 Cal. Rptr. 134, 138 (Ct. App.), *review denied and opinion ordered depublished*, May 26, 1987.

177. *Id.* at 140.

178. CAL. HEALTH & SAFETY CODE §§ 199.20-.60 (West 1985).

179. *Barlow*, 236 Cal. Rptr. at 139.

180. *Id.* at 138.

181. Barlow v. Superior Court, 236 Cal. Rptr. 134, 138 (Ct. App.), *review denied and opinion ordered depublished*, May 26, 1987.

comprehensive statutory scheme set out in the Health and Safety Code does not include provisions characterizing AIDS victims as threats to public health and safety.[182] The court was unwilling to play the role of state health official at the expense of the rights of AIDS victims. The court wrote: "while some cultures require a leper to ring a bell to warn the passerby, our Legislature has not so stigmatized the victims of AIDS. Our skies are not black with smoke from cities burned to prevent the spread of plague."[183]

B. Drafting a Canadian Statute Based on U.S. State Legislation

Today, state courts in the United States do not have to go through the elaborate analysis used in *Barlow* to convict a defendant. Since 1987, twenty-four states have enacted legislation that explicitly outlaws an intentional transfer of HIV[184] State courts now freely, and consistently, convict defendants based on these statutes.[185] Canada could look to these state laws as models for its own proposed legislation.

Many of these statutes reflect the developing policies of the Canadian courts. In outlawing the transfer of HIV, several U.S. state statutes codify the same views that the Canadian courts embrace, namely: (1) the defendant must know he is HIV-positive;[186] (2) the defendant's conduct exposed an individual to HIV, irrespective of whether he actually transferred the virus;[187] and (3) an affirmative defense is available in cases where the individual put at risk consented to the risky conduct, with knowledge of the defendant's HIV status.[188]

It may appear that Canadian courts are more lenient toward defendants than the three statutory standards above. For example,

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182. *Id.* at 140.

183. *Id.*

184. Blackwell, *supra* note 4, at B1; Milling, *supra* note 12, at C1.

185. *See, e.g.*, Illinois v. Dempsey, 242 Ill. App. 3d 568 (1993); Smallwood v. Maryland, 106 Md. App. 1 (1995); Ridenour v. Indiana, 639 N.E.2d 288 (1994); New Jersey v. Smith, 262 N.J. Super. 487 (1993); Louisiana v. Gamberella, 633 So. 2d 595 (1993).

186. GA. CODE ANN. § 16-5-60 (1995); FLA. STAT. ANN. § 775.0877 (West 1995); ILL. REV STAT. ch. 38, para. 12-16.2 (1995); TENN. CODE ANN. § 39-13-109 (1995); S.C. CODE ANN. § 44-29-145 (Law. Co-op. 1993); ARK. CODE ANN. § 5-14-123 (Michie 1994).

187. GA. CODE ANN. § 16-5-60 (1995); FLA. STAT. ANN. § 775.0877 (West 1995); ILL. REV STAT. ch. 38, para. 12-16.2 (1995); TENN. CODE ANN. § 39-13-109 (1995); S.C. CODE ANN. § 44-29-145 (Law. Co-op. 1993); ARK. CODE ANN. § 5-14-123 (Michie 1994).

188. FLA. STAT. ANN. § 775.0877 (West 1995); ILL. REV STAT. ch. 38, para. 12-16.2 (1995); TENN. CODE ANN. § 39-13-109 (1995).

in *Ssenyonga* and *Cuerrier*, the court would not convict a defendant because the partner consented to the risky conduct, even though the partner had no knowledge that the defendant carried HIV[189] These Canadian decisions, however, hinge on the courts' unwillingness to stretch traditional common law to criminalize this behavior, rather than a desire to label the defendants as not culpable.[190] Even the judges who have acquitted defendants of transferring the virus describe the defendant's behavior as reprehensible.[191]

V PROBLEMS WITH CODIFIED CRIMINALIZATION

Of course, even if Canada alleviates the problem of inconsistency in the application of AIDS law, other reasons still exist to avoid criminalizing the transfer of the virus. The criminalization of AIDS may protect the health of the public, but it will also lead to restrictions on the rights of HIV-carriers and potential carriers. AIDS activists, and many U.S. prosecutors, object to criminalizing the spread of HIV—whether or not there exists a statute on point. Those against criminalization argue that criminal charges will not stop a person who already faces a death sentence,[192] so the threat of incarceration represents at most a minimal deterrent. Further, incarceration would not stop the spread of the virus because an obvious threat still exists to other prison inmates.

Criminalizing the transfer of HIV also leads to questions regarding the justice system's duty to protect the public. Howard De Nike, a former San Francisco attorney who defended his client before a court-martial on charges of exposing the virus to the military, argues that western cultures only criminalize the spread of HIV, and other sexually transmitted diseases, because of our puritanical views about sex.[193] He points out that a person with a communicable respiratory disease would not be convicted for exposing others to the disease if he or she sneezed in someone's

189. Regina v. Ssenyonga, 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993); Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995).

190. Regina v. Ssenyonga, 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993); Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995).

191. Regina v. Mercer, 84 C.C.C.3d 41, 64 (Nfld. Ct. App. 1993); Regina v. Ssenyonga, 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993); Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995); Regina v. Thornton, 82 C.C.C.3d 530, 540 (1993) (Can.).

192. Salamone, *supra* note 4, at A1.

193. McKee, *supra* note 18, at 2.

face.[194] There seems to be an underlying belief that those who engage in sexual relationships are inherently more culpable.

Many of these cases deal with two adults who consent to sexual intercourse. AIDS activists claim that often the person who spreads the disease is in denial about his or her HIV status.[195] Whether the carrier's motive is malicious or not, a question of dual responsibility often exists.[196]

VI. CONCLUSION

The similarity between AIDS legal policy in Canada and the United States rests in the tension between protection of society and protection of the HIV carrier's civil rights. Health officials and AIDS rights activists pressure the Canadian Parliament not to enact laws that make inherently "human" acts criminal because they are committed by HIV-carriers. Ironically, this sympathy for HIV-carriers has given individual prosecutors and judges limitless power over the fates of those who transfer the virus. The Canadian Parliament has not passed laws regarding the transfer of HIV, so the Canadian courts have instead relied on common law and broad criminal statutes to punish those who "threaten" society with their illness.

Although some defendants are truly "criminal" in their intentional transfer of the virus, others are not. A judge may consider the circumstances surrounding the transfer when it comes to sentencing, but established minimum sentences for whatever crime is applied to the transfer will regulate this discretion.[197] On the other hand, some judges are unwilling to convict those who are truly culpable because of the lack of applicable statutory law.[198] Without statutes that address the special circumstances of AIDS, it is difficult to imagine a legal process that reflects the interests of the HIV-carrier or society.

The U.S. legislative bodies and courts have a history of the same tension between the health of society and the rights of the

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194. *Id.*

195. Salamone, *supra* note 4, at A1.

196. Terrah Keener, a representative of AIDS Vancouver, declares that it is the public's own responsibility to protect itself, not the judicial system's responsibility. *Spreading AIDS Criminal, supra* note 4, at B16.

197. Regina v. Thornton, 82 C.C.C.3d 530, 540 (1993) (Can.).

198. Regina v. Cuerrier, 26 W.C.B.2d 378, 378 (B.C. Sup. Ct. 1995); Regina v. Ssenyonga 81 C.C.C.3d 257, 266 (Ont. Gen. Div. 1993).

individual. Originally, there were no state statutes regarding the transfer of HIV Similar to their Canadian counterparts, ambitious prosecutors crafted cases around common law.[199] In the United States, however, the inconsistency in enforcement of the transfer of the virus made this area too controversial for many prosecutors.[200] Instead, most prosecutors have waited for the public to pressure the legislature to enact laws regarding the spread of HIV This pressure has resulted in twenty-four U.S. states enacting statutes that specifically address these controversial crimes.[201]

People who transfer HIV in Canada, or in U.S. states without AIDS legislation, may find themselves in a very difficult situation. How can someone change his behavior, or defend himself in court, when the elements of the "crime" depend on which judge or prosecutor takes the case? The inconsistency of the decisions of the Canadian courts regarding the transfer of HIV illustrates the possible injustice that can occur when courts punish defendants with minimal precedent and in the absence of statutes.

The Canadian Parliament should adopt legislation similar to that enacted in the United States. Many of these U.S. state statutes codify the positions of Canadian courts and create a consistent body of law for all Canadian courts to follow.[202] It appears that both the Canadian courts and the public have prioritized hindering the spread of HIV above protecting the rights of already-infected citizens. To protect HIV-infected citizens from having their civil rights trampled altogether, these citizens must have access to a fair judicial process that relies on universally applicable statutory law.

Pamela Reeder[*]

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199. Salamone, *supra* note 4, at A1.

200. *Id.*

201. *HIV and the Code*, *supra* note 6, at A6.

202. GA. CODE ANN. § 16-5-60 (1995); FLA. STAT. ANN. § 775.0877 (West 1995); ILL. REV STAT. ch. 38, para. 12-16.2 (1995); TENN. CODE ANN. § 39-13-109 (1995); S.C. CODE ANN. § 44-29-145 (Law. Co-op. 1993); ARK. CODE ANN. § 5-14-123 (Michie 1994).

* J.D. candidate, Loyola Law School, 1996; B.A., University of California, Berkeley, 1993. This Note is dedicated to my parents.